NO. 82-1066

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, APPELLANT

V.

HARRY PTASYNSKI, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

BRIEF FOR THE STATE OF LOUISIANA, APPELLEE

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STATEMENT OF THE CASE

At issue in this litigation is the constitutionality of Title I of the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, hereinafter referred to as the "Windfall Profit Tax Act" and cited to the Internal Revenue Code, as amended, 26 U.S.C.A. The United States District Court for the District of Wyoming held that the act violates the Uniformity Clause of the United States Constitution, U.S. Const., Art. I, §8, cl. 1, and the government has appealed.

Because the government's statement of the case is generally accurate in its description of the challenged statute and its summary of the proceedings below, there is no need for an extended discussion here. Nevertheless, the government has deemphasized certain procedural aspects

of the case, in particular, the interventions of the States of Louisiana and Texas. Because the claims of these intervening parties become important in connection with certain of the government's arguments,[1] a more complete understanding of their procedural status in the case is necessary.

The States of Louisiana and Texas moved in the District Court for leave to intervene as plaintiffs in order to assert their interest as States in having the Windfall Profit Tax Act declared unconstitutional and to obtain an order permanently enjoining the Commissioner of the Internal Revenue Service from further assessment and collection of the tax imposed by the act. The government opposed the intervention motions, arguing that the doctrine of sovereign immunity barred the States from asserting their claims and that the States lacked standing to pursue declaratory and injunctive relief. *See* R. at 289 and 347.

The District Court rejected the government's arguments, and granted the States' respective motions to intervene by order dated July 2, 1981. J. A. at 34. The authorities and principles supporting the District Court's decision are fully discussed in the memoranda filed by the States in support of their motions to intervene. *See* R. at 167 and 258. The States thus filed their complaints in inter-

[1] Based on its erroneous characterization of the action as being merely a suit by the individual taxpayer plaintiffs for a refund of taxes, the government argues that for purposes of determining whether the Windfall Profit Tax Act is unconstitutional, the Court must limit its consideration to facts in existence during the period for which refunds are claimed. The government's erroneous characterization of the action is also the basis for its "ripeness" argument. The substance of the arguments will, of course, be addressed below. *See infra* at 25. Nevertheless, it is important for a correct resolution of the issues to recognize the independent status of the States of Louisiana and Texas as parties in this action, since their claims are not tied in any way to the period for which the individual taxpayer plaintiffs seek a refund.

vention asserting their claims for declaratory and injunctive relief, J. A. at 1 and 6, and the government answered those complaints on August 27, 1981. J. A. at 37 and 40. The government has not sought review of the District Court's order allowing the States to intervene.

Having become plaintiffs in the action by virtue of their interventions, the States of Louisiana and Texas filed their own motions for summary judgment, each seeking a declaration that the Windfall Profit Tax Act is unconstitutional under the Uniformity Clause of the United States Constitution, and each praying for an injunction restraining the Commissioner of the Internal Revenue Service from further assessment and collection of the windfall profit tax. J. A. at 48 and 55. The declaratory relief sought was granted by the District Court's amended judgment entered on November 15, 1982. R. at 833. This judgment should be affirmed.

SUMMARY OF ARGUMENT

The Uniformity Clause of the United States Constitution contains but one limitation on the power of Congress to levy excise taxes. This limitation is narrowly drawn but absolute—all excises "shall be uniform throughout the United States." U.S. Const., Art. I, § 8, cl. 1. For almost 200 years, the courts of this country have consistently held that the uniformity required is strictly geographic uniformity and that no other factors are properly considered. The courts have repeatedly rejected arguments that Congress should have accommodated differences in local conditions, state laws or individual situations, in the interest of achieving intrinsic uniformity with respect to the operation of a particular tax. In every instance, the constitutionality of the tax in question has been

determined solely by reference to its geographical application. In the oft-quoted words of this Court, a tax is uniform within the meaning of the Constitution when "it operates with the same force and effect in every place where the subject of it is found." *Head Money Cases*, 112 U.S. 580, 594, 5 S.Ct. 247, 252 (1884).

The Windfall Profit Tax Act itself characterizes the tax imposed as an excise, and the government concurs in this characterization. There is no question but that the tax is governed by and must comply with the constitutional limitation contained in the Uniformity Clause. Similarly, there is no question but that the Windfall Profit Tax Act on its face exempts a certain geographically defined area from the operation of the tax. This is not a case where Congress has merely taken geographical considerations into account in defining the subject of taxation. Rather, Congress has taxed the same subject differently solely on the basis of its geographic location. Since by definition the tax does not operate with the same force and effect in every place where the subject of it is found, the District Court was clearly correct in declaring the Windfall Profit Tax Act to be unconstitutional.

In addition to violating the express prohibition of the Uniformity Clause, the act violates the underlying purpose of the clause because of its discrimination in favor of Alaska. To the extent that *any* oil produced in Alaska is exempt from the tax, that State's industry and economy is promoted at the expense of the other States. There is no support for the government's contention that the purpose of the clause was limited to preventing combinations of States from imposing taxes that grant an undue preference to their own States or to impose an oppressive discrimination against a minority. The drafters' intent was clearly to

prevent not just all discrimination, but even the possibility of discrimination. Equally unsupportable is the government's contention that the purpose of the clause is not violated if Congress has a rational justification for drawing geographic distinctions in the imposition of excises. Indeed, the justifications suggested by the government here—a desire to accommodate special circumstances purportedly confined to a limited geographic area and a desire to distribute the tax burden more equitably among the States—are particularly inappropriate since the drafters specifically rejected similar considerations when they chose to adopt a geographic standard for uniformity. In any event, the jurisprudence confirms that *no* justification can render a geographically non-uniform tax constitutional.

In an attempt to buttress its arguments on the merits, the government refers throughout its brief to a number of political and economic factors, implicitly suggesting that these factors are somehow relevant to a determination of constitutionality under the Uniformity Clause. While the correctness of the government's assertions regarding these factors is debatable, it is also irrelevant. Regardless of whether the effect is *de minimis*, geographic non-uniformity in the imposition of excise taxes is absolutely prohibited by the Uniformity Clause, and this is true regardless of the fiscal consequences to the government of maintaining the unconstitutional tax.

In a final attempt to save at least some of the act from invalidation, the government contends that the act's unconstitutionality can be cured by severing the provisions which create the exemption for certain Alaskan oil. Despite its simplistic presentation of the question as being whether the general separability clause contained in the Internal Revenue Code is dispositive of the severability

question, the government's argument reflects its awareness that notwithstanding an applicable separability clause, the determining factor is always legislative intent. Properly phrased, the question is whether Congress would have enacted the Windfall Profit Tax Act in its present form absent the exemption for certain Alaskan oil. In view of the fact that the act is a comprehensive integrated scheme designed not merely to raise tax revenues, but to do so without overly discouraging domestic oil production, and in view of the fact that the exemption for certain Alaskan oil was considered to be an integral part of the delicate balance that was struck between these competing objectives, and, indeed, was perhaps the overriding factor in Congress' decision to tax "newly discovered" oil, the conclusion is inescapable that the act would not have been enacted in its present form absent the exemption.

Additionally, to extend the tax to oil which Congress clearly intended to exempt under the guise of severance would be to engage in impermissible judicial legislation. The myriad of alternatives suggested by the government's arguments in this case (extension of the tax to exempt Alaskan oil, extension of the tax to exempt Alaskan oil lying within the boundaries of the State of Alaska, extension of the exemption to production in all areas similar to the Arctic Circle or areas located more than 75 miles from a pipeline connection, extension of the exemption to all newly-discovered oil, or invalidation of all of the Titles contained in Pub. L. No. 96-223) effectively illustrates that Congress, not the Court, should be entrusted with the task of rewriting the Windfall Profit Tax Act to comport with constitutional requirements in the way that will best effectuate the legislative purpose.

ARGUMENT

I. The Windfall Profit Tax Violates the Uniformity Clause of the United States Constitution.

A. The Uniformity Clause Requires That Federal Excise Taxes Be Geographically Uniform.

The Uniformity Clause of the United States Constitution, Article I, § 8, cl. 1, provides:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises...; *but all* Duties, Imposts and *Excises shall be uniform throughout the United States.*

(Emphasis added.) There are no qualifications or limitations contained in the clause; the requirement of uniformity is absolute. When this Court was first presented with an opportunity to comment on the clause shortly after its adoption, Justice Paterson expounded upon the advantages of having such a rule for indirect taxes. Rejecting arguments that a tax on carriages should be governed by the rule of apportionment, Justice Paterson wrote that if apportionment were to be required,

> [w]e shall be obliged to resort to intricate and endless valuations and assessments, in which everything will be arbitrary, and nothing certain. There will be no rule to walk by. *The rule of uniformity, on the contrary, implies certainty,* and leaves nothing to the will and pleasure of the assessor. In such case, the object and the sum coincide, the rule and the thing unite, and of course there can be no imposition. *The truth is, that the articles taxed in one state should be taxed in another; in this way, the spirit of jealousy is*

appeased, and tranquillity preserved; in this way, the pressure on industry will be equal in the several states, and the relation between the different objects of taxation duly preserved.

Hylton v. United States, 3 U.S. (3 Dall.) 171, 180 (1796). (Emphasis added.)

That the rule of uniformity is not subject to any qualification or limitation has never been questioned. The only issue that has ever been raised is whether the uniformity required is intrinsic or geographic. On the one hand, it has been argued that Congress should accommodate differences in local conditions, state laws or individual situations, so as to achieve intrinsic uniformity with respect to the operation of a particular tax. On the other hand, it has been argued that the Constitution requires strictly geographic uniformity, despite the fact that a geographically uniform tax might operate unequally due to particular local conditions, and thus be intrinsically non-uniform.

This issue was first addressed by the Court in the *Head Money Cases*, 112 U.S. 580, 5 S.Ct. 247 (1884), where the argument was made that a geographically uniform tax on passengers arriving in the United States by ocean navigation was unconstitutional because only those states with ports were affected by the tax. It was argued that to be constitutionally uniform, the tax had to apply to passengers arriving by railroad or other inland modes of conveyance as well, since only then would the tax operate with intrinsic equality. The Court squarely rejected this argument, stating:

The uniformity here prescribed has reference to the various *localities* in which the tax is intended

> to operate. "It shall be uniform throughout the United States."...*The tax is uniform when it operates with the same force and effect in every place where the subject of it is found.*

112 U.S. at 594, 5 S.Ct. at 252. (Emphasis added.) Since the tax operated with exactly the same effect in every place where foreign passengers arriving by ocean navigation could be landed, it was held to be constitutional.

In *Knowlton v. Moore,* 178 U.S. 41, 20 S.Ct. 747 (1900), the Court confirmed that this construction of the clause comported with the intent of its drafters. After an exhaustive review of the legislative history of the clause, the Court concluded that words of the clause "do not signify an intrinsic but simply a geographical uniformity." 178 U.S. at 106, 20 S.Ct. at 772. In support of this conclusion, the Court discussed the debates in the Continental Congress where "the pith of the controversy...was that even, although the same duty or the same impost or the same excise was laid all over the United States, it might operate unequally by reason of the unequal distribution or existence of the article taxed among the respective States." 178 U.S. at 104, 20 S.Ct. at 772. By the time the Constitutional Convention was convened, the words "uniformity throughout the United States" had acquired the unquestioned meaning of geographic uniformity. 178 U.S. at 101, 20 S.Ct. at 771. Nevertheless, there were still those who argued that intrinsic uniformity should be required. 178 U.S. at 104-09, 20 S.Ct. at 772-73. These arguments were rejected. It is clear from the Court's discussion that a conscious decision was made to require strictly geographic uniformity, notwithstanding full recognition of the fact that intrinsic inequalities might result.

Based on this legislative history, the *Knowlton* Court found it irrelevant that the rate of the tax on legacies there under consideration depended on a factor which varied with the testamentary and intestacy laws of the various states. The Uniformity Clause was held to impose a "purely geographical" limitation, 178 U.S. at 96, 20 S.Ct. at 769, and since the same degree of relationship wherever existing was levied on at the same rate throughout the United States, the tax was held to be geographically uniform and therefore constitutional. 178 U.S. at 106, 20 S.Ct. at 773. Following the rule first adopted in the *Head Money Cases*, the Court reiterated that the Uniformity Clause requires "that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, that wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate." 178 U.S. at 84, 20 S.Ct. at 764. (Emphasis added.)

In subsequent cases as well, the Court has repeatedly held that the uniformity required is strictly geographic uniformity. Thus, in *Florida v. Mellon*, 273 U.S. 12, 17, 47 S.Ct. 265, 266 (1927), the Court held that the Uniformity Clause requires "that the law shall be uniform in the sense that by its provisions the rule of liability shall be the same in all parts of the United States," and in *La Belle Iron Works v. United States*, 256 U.S. 377, 392, 41 S.Ct. 528, 532 (1921), the Court construed the clause as requiring "territorial" uniformity. Justice Field in his opinion in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 592, 15 S.Ct. 673, 694 (1895), explained:

> The uniformity thus required is the uniformity throughout the United States of the duty, impost,

> and excise levied. That is, the tax levied cannot be one sum upon an article at one place and a different sum upon the same article at another place. The duty received must be the same at all places throughout the United States, proportioned to the quantity of the article disposed of or the extent of the business done.[2]

Just as consistently, the Court has refused to consider anything other than the geographical application of taxes challenged under the Uniformity Clause. As the Court stated in *Patton v. Brady,* 184 U.S. 608, 623, 22 S.Ct. 493, 498 (1902): "Geographical uniformity being therefore that only which is prescribed by the Constitution the courts may not add new conditions...."[3]

In light of the universal and unwaivering recognition that the Uniformity Clause requires strictly geographic uniformity, it is not surprising that there are no reported cases in which the courts have been presented with a duty, impost or excise that was not geographically uniform. Not until passage of the Windfall Profit Tax Act has Congress dared to disregard the unambiguous limitation on its taxing power that is contained in the Uniformity Clause. Indeed, there is only one case in which there was even a colorable claim that Congress had violated the requirement that duties, imposts and excises be geographically uniform.

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[2] *See also* Bromley v. McCaughn, 280 U.S. 124, 50 S.Ct. 46 (1929); Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 57 S.Ct. 883 (1937); Billings v. United States, 232 U.S. 261, 34 S.Ct. 421 (1914); Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 36 S.Ct. 236 (1916).

[3] *See also* Fernandez v. Wiener, 326 U.S. 340, 66 S.Ct. 178 (1945); Riggs v. Del Drago, 317 U.S. 95, 63 S.Ct. 109 (1942); Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 51 S.Ct. 608 (1931); Poe v. Seaborn, 282 U.S. 101, 51 S.Ct. 58 (1930); Flint v. Stone Tracy Co., 220 U.S. 107, 31 S.Ct. 342 (1911).

In *Downes v. Bidwell*, 182 U.S. 244, 21 S.Ct. 770 (1901), the provision of the Foraker Act which imposed an import duty on merchandise brought into the United States from Puerto Rico was challenged as being violative of the Uniformity Clause. The act was upheld, but only because the Court concluded that territories such as Puerto Rico are not part of the United States for purposes of the requirement that imposts "be uniform throughout the United States." The Court clearly recognized that absent this finding, the facially non-uniform act would have been unconstitutional. *See* 182 U.S. at 249, 21 S.Ct. at 772.

There can be no contention here as there was in *Downes v. Bidwell* that the locality exempted by the Windfall Profit Tax Act is not within the United States.[4] As will be shown more fully below, the Uniformity Clause is clearly applicable in this case, and it just as clearly requires that the Windfall Profit Tax Act be declared unconstitutional.

B. The Windfall Profit Tax Act Unconstitutionally Exempts Certain Production from the Tax Solely on the Basis of Its Geographic Location.

The Windfall Profit Tax Act characterizes the tax imposed as being an excise on the "windfall profit" from domestic crude oil, other than "exempt oil," produced in the United States after February 29, 1980. I.R.C. §§ 4986(a), 4991(a), 4996(b)(7). "Exempt oil" is defined to

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[4] The government points out that in addition to exempting areas within the State of Alaska, the act exempts areas in the federal outer continental shelf. Brief for the United States at 20-21 n.27, 32-33 n.33. Assuming that Congress can constitutionally exempt the latter areas because they are not part of the United States for purposes of the Uniformity Clause, a problem of severability is presented. *See infra* at 42. Nevertheless, this in no way mitigates the unconstitutionality of treating production in the State of Alaska different from production in other States.

include "any exempt Alaskan oil," which in turn is defined as:

> [A]ny crude oil (other than Sadlerochit oil) which is produced—
> (1) from a reservoir from which oil has been produced in commercial quantities through a well located north of the Arctic Circle, or
> (2) from a well located on the northerly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System.

I.R.C. §§ 4991(b), 4994(e).

Despite occasional references to the subject of the tax as being "windfall profits," the government concedes that in reality the tax is imposed "upon the activity of mineral extraction." J. S. at 14-15 n.22. Therefore, the government agrees that the tax is properly classified as an excise. There is no question but that the act is governed by and must comply with the constitutional limitation contained in the Uniformity Clause.

Similarly, despite its attempt to characterize the Alaskan exemption as being a classification that "merely takes geographical considerations into account," the government concedes that the exemption is "geographically defined so as to exclude oil located in all of the 50 states except portions of Alaska." Brief for the United States at 28. Applying the test of geographic uniformity, it is clear that the tax does not operate with the same force and effect in every place where the subject of it is found. The extraction of crude oil is identically taxed throughout the United States with one important exception—if the oil is extracted north of the Arctic Circle or on the northerly side of the

divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System, it is not taxed at all. Since the tax imposed by the act is not "uniform throughout the United States" as that phrase has been consistently construed, the tax must be declared invalid as being violative of the Uniformity Clause of the United States Constitution.

Although the simplicity of this conclusion may be somewhat obscured by the government's arguments, its correctness cannot be refuted. The government takes great pains to establish that Congress can take geographical considerations into account in drawing tax classifications without violating the Uniformity Clause, and to show that the Alaskan exemption is such a classification. Nevertheless, the same authorities relied upon by the government to establish the former proposition show the fallacy of the latter. These authorities establish that the test for constitutionality under the Uniformity Clause is whether the tax operates with the same force and effect in every place where the subject of it is found. If it does, it is irrelevant whether Congress took geographical considerations into account in defining the subject to be taxed or whether the subject exists only in certain geographic areas. There is simply no support for the government's suggestion that the Uniformity Clause requires Congress to have a rational justification, albeit subject to "special scrutiny," for defining the subject of taxation as it does. The *only* requirement is that the tax be geographically uniform.

Interestingly enough, this rule was first applied in the *Head Money Cases, supra,* the decision so heavily relied upon by the government here. As the government correctly points out, the issue there was the constitutionality of a duty levied against transportation companies

on foreign passengers entering the United States by vessel. Brief for the United States at 31. The government is also correct in pointing out that since the subject of the tax was foreign passengers arriving by navigation, not foreign passengers generally, and since the tax operated precisely alike in every port of the United States where such passengers could be landed, the tax was constitutionally uniform in that it operated with the same force and effect in every place where the subject of it was found. *Id.* at 33-34. *See also supra* at 8-9. The remainder of the government's analysis, however, cannot withstand scrutiny.

In asserting that "[t]he court squarely rejected the contention that the duty violated the Uniformity Clause on the ground that it did not operate with strict geographic uniformity since, by its terms, it could apply only in states having sea ports (a matter necessarily determined by their geography) and not in landlocked states where foreign passengers might arrive by railroad or other inland mode of conveyance," *id.* at 31, the government has confused intrinsic with geographic uniformity. Certainly, the duty was intrinsically non-uniform since its subject did not exist in inland states. It was in this context that the Court observed that "[p]erfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream...." 112 U.S. at 595, 5 S.Ct. at 252. Yet the Court held that since the duty was *geographically* uniform, there existed "substantial uniformity within the meaning and purpose of the Constitution." *Id.*[5]

[5] Interestingly enough, although the duty operated only in certain areas, no "special scrutiny" was required. As in all of the subsequent cases construing the Uniformity Clause, the Court in the *Head Money Cases* found it irrelevant that the duty might operate differently in different areas and thus be intrinsically non-uniform.

Similarly misplaced is the government's reliance on the Court's statement that "the evil to be remedied by this legislation has no existence in our inland borders, and immigration in that quarter needed no such regulation." *Id.* The ultimate question in the Court's view was not "whether Congress had a reasonable basis for distinguishing between the activity that was taxed in coastal states and the similar activity that was untaxed in inland states," Brief for the United States at 32, but whether the tax operated "with the same force and effect in every place where the subject of it [was] found." 112 U.S. at 594, 5 S.Ct. at 252. The "evil to be remedied" in the *Head Money Cases* was the flood of uneducated, poor immigrants arriving from overseas, and the purpose of the tax was to establish a fund to care for those immigrants. Because this problem was geographically isolated in the sense that it only existed in ports, legislation to resolve the problem could take into account differences existing between different parts of the country by defining the subject of the tax in terms of ports. The Court's holding makes it clear, however, that the tax was constitutional only because it applied uniformly to *all* ports throughout the United States.[6]

Certainly, Congress has the power to choose subjects of taxation that, as a matter of geographic considerations alone, exist only in certain states—*but only if* wherever the subject does exists, it is taxed according to the same plan and at the same rate. Similarly, Congress has the power to

[6] To the extent that the government views the *Head Money Cases* as requiring Congress to have a rational basis for distinguishing between different, albeit similar, subjects of taxation, the government has misconstrued the case. The case stands only for the proposition that the *same* subject must be given equal tax treatment wherever it exists. Indeed, there is no authority which suggests that the Uniformity Clause requires Congress to have a rational basis for distinguishing between different subjects of taxation.

take geographical considerations into account in defining subjects of taxation so as to remedy specific national problems—but again, *only if* the subject is taxed according to the same plan and at the same rate wherever it exists. Thus, while Congress may have the power to take geographical considerations into account in drawing legitimate tax classifications, the emphasis should be on *legitimate*. Under the *Head Money Cases*, this means that the classification must be such that the tax will operate with the same force and effect in every place where the subject of it is found.

The other decisions under the Uniformity Clause relied upon by the government support rather than refute this conclusion. For example, in *Knowlton v. Moore, supra*, the Court found it irrelevant that the inheritance tax there at issue might operate with intrinsic inequality due to differing state testamentary and intestacy laws. No "special scrutiny" was required, only the test of geographic uniformity. Since the same degree of relationship wherever existing was levied on at the same rate throughout the United States, the tax was held to be constitutional. *See supra* at 9-10. Whether or not Congress had a rational basis for defining the subject of the tax as it did was not even discussed.[7]

The government has similarly misconstrued the purportedly analogous decisions of this Court construing the Bankruptcy Clause. As the government points out, the requirement contained in Article I, § 8, cl. 4, of the

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[7] *See also* Flint v. Stone Tracy Co., 220 U.S. 107, 31 S.Ct. 342 (1911); Billings v. United States, 232 U.S. 261, 34 S.Ct. 421 (1914); Fernandez v. Wiener, 326 U.S. 340, 66 S.Ct. 178 (1945). These cases confirm that while Congress may choose subjects of taxation that do not exist equally throughout the United States, it can only do so provided the subjects are equally taxed wherever they exist.

Constitution that bankruptcy laws be uniform throughout the United States is similar to that contained in the Uniformity Clause. Nevertheless, the government's reliance on this Court's construction of the Bankruptcy Clause in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 95 S.Ct. 335 (1974), is misplaced. In that case, the Court was presented with an unusual statute which by its terms was operative only for a 180-day period, a period which had expired before the case was presented. Although by its terms the statute was applicable only to reorganization proceedings in a statutorily defined region, it was affirmatively established that no reorganization proceeding was pending outside the defined region either on the effective date of the statute or during the following 180-day period. Thus, the Court was able to conclude that "[t]he definition of the region does not obscure the reality that the legislation applies to all railroads under reorganization pursuant to § 77 during the time the Act applies." 419 U.S. at 161, 95 S.Ct. at 367. In holding that this was sufficient to render the statute constitutionally uniform, the Court specifically confirmed that its construction of the Bankruptcy Clause comported with its construction of other "uniform" provisions of the Constitution, citing the *Head Money Cases*.

It is in the context of the Court's holding that one must read the statement, relied upon by the government, that the uniformity provision does not deny Congress the power to take into account differences that exist between different parts of the country and to fashion legislation to resolve geographically isolated problems. Brief for the United States at 35. Certainly, the Court was not saying that Congress has carte blanche to disregard the requirement of uniformity whenever a lack of uniformity can be justified by differences existing in particular parts of the country or by the need to resolve geographically isolated

problems. Otherwise, the Court would not have had to resolve the question of whether the statute was in fact geographically uniform. The geographically isolated problem in *Regional Rail Reorganization Act Cases* was the pendency of railroad reorganization proceedings only in a particular region. Since the reorganization proceedings affected by the statute were the only ones in fact existing in the country, the statute was able to take into account differences existing between different parts of the country and still operate with the same force and effect in every place where the subject of it was found. Thus, although Congress may define subjects of legislation geographically to remedy specific national problems, it can only do so if *in reality*, if not by its terms, the law applies equally to the same subject wherever it exists.

This construction of *Regional Rail Reorganization Act Cases* was recently confirmed in *Railway Labor Executives' Ass'n v. Gibbons,* 455 U.S. 457, 102 S.Ct. 1169 (1982), where the Court held that a bankruptcy law which applied only to one named railroad was unconstitutionally non-uniform. Regarding its prior holding in *Regional Rail Reorganization Act Cases,* the Court stated:

> In the *3R Act Cases,* we upheld Congress' response to the existing rail transportation crisis in the Northeast. Since no railroad reorganization proceeding was then pending outside of the region defined by the Regional Rail Reorganization Act of 1973 (3R Act), 87 Stat. 985, 45 U.S.C. § 701 *et seq.,* the Act in fact operated uniformly upon all railroads then in bankruptcy proceedings.

455 U.S. at 469, 102 S.Ct. at 1176. The Court concluded that to survive scrutiny under the uniformity requirement of the Bankruptcy Clause, a law must at least apply uni-

formly to a defined class of debtors. As the Court stated: "To hold otherwise would allow Congress to repeal the uniformity requirement from Art. I, § 8, cl. 4, of the Constitution." 455 U.S. at 473, 102 S.Ct. at 1178.

Thus, the Court's construction of the uniformity requirement of the Bankruptcy Clause is consistent with its construction of the uniformity requirement of the Uniformity Clause: Although Congress may select some and omit other possible subjects for legislation, the law must at least apply uniformly to the defined subject chosen. As the Court first stated in the *Head Money Cases*, to be constitutionally uniform, a law must operate "with the same force and effect in every place where the subject of it is found."

The government's reliance on decisions construing the Port Preference Clause contained in Article I, § 9, cl. 6, of the Constitution is also misplaced. As the government's quotation from *Commission v. Texas & N.O.R. Co.*, 284 U.S. 125, 52 S.Ct. 74 (1931), shows, the Port Preference Clause has not been construed to proscribe laws "merely because they incidentally favored or prejudiced some line of commerce in one state or another." Brief for the United States at 38. This might also be said of the Uniformity Clause, since it has not been construed to proscribe taxes that only incidentally favor or prejudice certain areas because of the operation of geographically uniform taxes on subjects that do not exist equally among the various states. Just as the Court recognized in *Commission v. Texas & N.O.R. Co.* that Congress would be stripped of much of its power under the Commerce Clause if the Port Preference Clause were construed to prohibit facility-specific regulations that only incidentally favored or discriminated against particular ports because of the geographic location of the facilities, the Court in *Knowlton*

v. Moore, recognized that the power of taxation would be rendered impotent if the Uniformity Clause were construed to prohibit geographically uniform taxes that only incidentally favored or discriminated against particular areas because of the geographic location of the subjects taxed. 178 U.S. at 109, 20 S.Ct. at 774. As the Court noted in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 435 (1855), it is only *direct* preferences or discriminations that are proscribed by the Port Preference Clause. The same is true of the Uniformity Clause.[8]

Keeping in mind the foregoing analysis of the authorities relied upon by the government, the conclusion is inescapable that the Windfall Profit Tax Act cannot be sustained as an excise that merely takes geographic considerations into account.

[8] This is not to say, however, that only "systematic" preferences or discriminations are prohibited, if by that latter phrase it is meant that a part of a State can be preferred or discriminated against with impunity so long as another part of the State is treated the same as any other State. In support of its argument that this is in fact the meaning of the Port Preference Clause cases, the government quotes the Court's statement in *Wheeling & Belmont Bridge Co.* that discrimination between individual ports within the same or different states is not forbidden, but only discrimination between States. Brief for the United States at 38. While this may have been an additional ground for finding that the incidentally discriminatory regulation there at issue was not unconstitutional, it is unlikely that the same reasoning would be applied in all cases. For example, if Congress were to provide that vessels bound for San Francisco must enter and clear at Portland, Oregon, Los Angeles and other California ports would not be discriminated against, yet the regulation would clearly be forbidden by the Port Preference Clause. Indeed, this is exactly the type of regulation that the drafters of the clause intended to preclude. *See Knowlton v. Moore*, 178 U.S. at 104, 20 S.Ct. at 772. In any event, in none of the various articulations of the requirement imposed by the Uniformity Clause has there ever been a suggestion that an entire State must be singled out for preferential or discriminatory treatment in order for a violation to occur. The clause has been consistently construed to prohibit the unequal treatment of a particular geographic locality, regardless of whether that locality comprises part of one State, all of one State, or more than one State.

While the *Head Money Cases* establishes that Congress can take geographic considerations into account in defining the subject of taxation so as to remedy a specific national problem, it also establishes that Congress can only do so provided it does not violate the constitutional requirement that the tax must operate with the same force and effect wherever the subject of it is found. In enacting the Windfall Profit Tax Act, Congress clearly did more than take geographical considerations into account. It defined an exemption from the tax solely on the basis of geographic location so that by definition, the tax does not operate with the same force and effect in every place where the subject of it is found. This same analysis applies regardless of whether the subject is considered to be the extraction of crude oil, windfall profits from crude oil, crude oil itself, or merely "newly discovered" crude oil, as the government variously suggests.

Similarly, while the Court in the *Regional Rail Reorganization Act Cases* upheld a bankruptcy law that contained geographically defined distinctions, it did so only because it was able to conclude that in fact, if not by its terms, the law operated with the same force and effect in every place where the subject of it was found during the entire time that the law was in effect. Obviously, the same conclusion cannot be reached in this case since crude oil is currently being produced in the exempt areas, and it is not being subjected to the tax. Despite this clear distinction, the government makes two arguments in an attempt to fit the case within the rationale of the *Regional Rail Reorganization Act Cases.*

First, the government attempts to draw a distinction between crude oil generally and crude oil produced in the exempt areas. The government also suggests that the

"windfall profits" generated by the former are somehow different from those generated by the latter. At least, argues the government, Congress had reason to believe that the remote location, fragile environment and extreme climatic conditions made production in the exempt area different from production in other areas. Nevertheless, even assuming that crude oil produced in remote locations where the environment is fragile and the climatic conditions are extreme is so different from crude oil generally as to constitute a different subject of taxation, to fit this case within even an extension of the rationale of the *Regional Rail Reorganization Act Cases,* the Court would have to be able to conclude that during the life of the Windfall Profit Tax Act, all exempt Alaskan crude oil will qualify as this different type of oil and that none of this different type of oil will be produced anywhere else.

Of course, this is impossible since Congress has not specified the parameters of what (other than geographic location) makes the exempt crude oil different from crude oil generally. How far must the production be from existing markets? How far must it be from existing transportation systems? How extreme must the climate be and in what respects? What constitutes a "fragile" environment? All of these questions and more must be answered before it can be determined whether, despite its terms, the Windfall Profit Tax Act will in fact operate with the same force and effect in every place where this particular type of oil is found. Even then, it may still be impossible to say that during the entire life of the act, the operation of the tax will in fact remain uniform.

To require Congress to define subjects of taxation in terms of the conditions which set them apart for different treatment rather than in geographic terms is quite obviously

more than to require "mere niceties of draftsmanship." It requires Congress to focus on and precisely define the factors, other than geographic location, that make the subject different. Additionally, it provides substantive protection by ensuring that the tax will in fact be geographically uniform. After all, it is uniformity that is required by the Constitution, not merely a belief by Congress that its enactment will be uniform.

In a second attempt to fit this case within the rationale of the *Regional Rail Reorganization Act Cases*, the government asserts that the tax in fact operated with geographic uniformity during the period for which the individual taxpayer plaintiffs claim a refund because no exempt Alaskan oil was produced during that period. Nevertheless, the argument that the Court can only consider the operation of the tax during the period for which the individual taxpayer plaintiffs have claimed a refund completely ignores the independent status of the States of Louisiana and Texas who were granted leave to intervene to assert their interests as States in having the act declared unconstitutional.[9] Obviously, the refund period has no relation whatsoever to the claims raised by the States in their complaints in intervention and in their motions for summary judgment. Even as regards the claims

[9] The government's passing observation that it is "highly questionable" whether the States would have standing to assert their claims and its assertion that the doctrine of sovereign immunity would bar the States' suits are surprising in view of the fact that the government has not sought review of the District Court's ruling which allowed the States to assert their claims. The government adamantly opposed the States' interventions for the same reasons alluded to in footnote 36 of its brief to this Court. After careful consideration of these arguments, the District Court allowed the States to intervene as plaintiffs to assert their claims, a decision that necessarily encompassed a resolution of these issues contrary to the government's assertions. *See supra* at 2-3, R. at 50, 254, 271-73, and 348-50. Their claims cannot now be ignored.

of the individual taxpayer plaintiffs, however, the argument is insupportable.

The fallacy of the government's argument lies with its premise that the Windfall Profit Tax Act only became unconstitutional once exempt Alaskan oil was actually produced. It is not production of exempt oil that renders the act unconstitutional, but a lack of geographic uniformity which is apparent on the face of the act. This is not a case where a facially constitutional measure is being challenged solely on the ground that it is unconstitutional as applied. Nor is this a case where the Court can conclude that despite its facial unconstitutionality, the act in fact operated constitutionally the entire time that it was in effect. To accept the government's argument would require an unwarranted extention of the rationale of the *Regional Rail Reorganization Act Cases* and a complete distortion of its holding.[10]

[10] The government attempts to buttress its argument on the merits by asserting that until exempt Alaskan oil was actually produced, the individual taxpayer plaintiffs suffered no injury. Brief for the United States at 42. Nevertheless, the existence of injury is not determinative of the merits of the taxpayers' claims, but only their standing to assert those claims. Although the government concedes that the taxpayers have standing, Brief for the United States at 41 n.35, it loses sight of the fact that the injury which gives them standing is not the favorable treatment given to others, but rather it is having to pay a facially unconstitutional tax.

A proper understanding of the injury suffered by the individual taxpayer plaintiffs also answers the government's related argument that the doctrine of "ripeness" precludes a decision in this case. As the government points out, under the doctrine of "ripeness," a court will generally not decide an issue unless the alleged constitutional injury has actually occurred, or in injunctive suits, unless constitutional injury is imminent. Brief for the United States at 40-41. In this case, the injury was sustained when the individual taxpayer plaintiffs were forced to pay the unconstitutional tax. The States likewise were injured prior to the actual commencement of production in the exempt areas, since from the date of its enactment, the act created an incentive for production in the State of Alaska which was not given to other States.

The Port Preference Clause cases relied upon by the government likewise fail to establish the constitutionality of the Windfall Profit Tax Act. Unlike the incidentally preferential regulations at issue in those cases, the Windfall Profit Tax Act grants an explicit and direct geographical preference to Alaska.

Thus, unlike the duty in the *Head Money Cases*, the Windfall Profit Tax Act does not by its terms apply to the same subject wherever it exists. Unlike the *Regional Rail Reorganization Act Cases*, it is impossible for the Court to conclude that despite its terms, the act will in fact apply to the same subject wherever it exists. Finally, unlike the legislation challenged in the Port Preference Clause cases, the act grants an explicit and direct preference to Alaska which discriminates against the other States. There is no escape from the conclusion that the Windfall Profit Tax Act violates the Uniformity Clause and that it is therefore unconstitutional.

C. The Windfall Profit Tax Act Violates the Underlying Purpose of the Uniformity Clause Because It Discriminates in Favor of Alaska and Against the Remaining 49 States.

It is clear from the language of the Uniformity Clause and the jurisprudence construing it that the only relevant criteria for judging the constitutionality of an indirect tax is its geographic application. Thus, if an indirect tax is not geographically uniform, it is unconstitutional, regardless of any discrimination which might result from that non-uniformity.[11] Nevertheless, it is equally clear

[11] In a recent case construing the analogous uniformity requirement for bankruptcy laws, this Court recognized: "The issue is not whether Congress has discriminated against the Rock Island estate, but

from the legislative history of the clause that its underlying purpose was to preclude the possibility of such discrimination. Similarly, while the clause has been consistently construed in terms of "territorial" uniformity and as requiring that an indirect tax operate "with the same force and effect *in every place* where the subject of it is found," the legislative history of the clause shows that the drafters were primarily concerned with the possible discrimination against States that might result if indirect taxes were not required to be geographically uniform.

There is no question but that Justice Story's explanation of the purpose of the Uniformity Clause is the proper one. Since all of the parties rely on this explanation, an extended quotation may be appropriate. Justice Story wrote:

> The answer to the...[uniformity requirement] may be given in a few words. It was to cut off all undue preferences of one State over another in the regulation of subjects affecting their common interests. Unless duties, imposts, and excises were uniform, the grossest and most oppressive inequalities, vitally affecting the pursuits and employments of the people of different States, might exist. The agriculture, commerce, or manufactures of one State might be built up on the ruins of those of another; and a combination of a few States in Congress might secure a monopoly of certain branches of trade and business to themselves, to the injury, if not to the destruction, of their less favored neighbors. The Constitution, throughout all its provisions, is an

(Footnote 11 continued)
whether RITA's employee protection provisions are uniform bankruptcy laws. The uniformity requirement of the Bankruptcy Clause is not an Equal Protection Clause for bankrupts." *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 470 n.11, 102 S.Ct. 1169, 1177 (1982).

> instrument of checks and restraints, as well as of powers. It does not rely on confidence in the general government to preserve the interests of all the States. It is founded in a wholesome and strenuous jealousy, which, foreseeing the possibility of mischief, guards with solicitude against any exercise of power which may endanger the States, as far as it is practicable. If this provision as to uniformity of duties had been omitted, although the power might never have been abused to the injury of the feebler States of the Union, (a presumption which history does not justify us in deeming quite safe or certain,) yet it would, of itself, have been sufficient to demolish, in a practical sense, the value of most of the other restrictive clauses in the Constitution. New York and Pennsylvania might, by an easy combination with the Southern States, have destroyed the whole navigation of New England. A combination of a different character, between the New England and the Western States, might have borne down the agriculture of the South; and a combination of a yet different character might have struck at the vital interests of manufacturers. So that the general propriety of this clause is established by its intrinsic political wisdom, as well as by its tendency to quiet alarms and suppress discontents.

J. Story, Commentaries on the Constitution of the United States 683 (4th ed. 1873). It is clear from Justice Story's explanation that the individual States were intended beneficiaries of the Uniformity Clause, and that the purpose of the clause was to prevent the possibility that various combinations of States might abuse the federal taxing power by giving one State preferential treatment over another.

After an exhaustive review of the legislative history of the Uniformity Clause, this Court similarly concluded that "the possible discrimination against one or more States was the only thing intended to be provided for by the rule which uniformity imposed upon the power to levy duties, imposts, and excises." *Knowlton v. Moore*, 178 U.S. 41, 89, 20 S.Ct. 747, 766 (1900). The Court pointed out that in discussions regarding the need to create a federal government which would have the necessary taxing power, "the sole and the only question which was ever present and in every form was discussed, was the operation of any taxing power which might be granted to Congress upon the respective states; in other words, the discrimination as regards states which might arise from a greater or lesser proportion of any tax being paid within the geographical limits of a particular state." *Id.* at 769. Thus, the geographical limitation on duties, imposts and excises was construed as having the same purpose as the requirement that direct taxes be apportioned—"the protection of the states, to prevent their being called upon to contribute more than was deemed their due share of the burden." *Id.* at 766.

The purpose of the Uniformity Clause was again examined in *Downes v. Bidwell*, 182 U.S. 244, 278, 21 S.Ct. 770, 783 (1901), where the Court stated:

> In determining the meaning of the words of Article 1, section 8, "uniform throughout the United States," we are bound to consider [all clauses using that phrase]....*The object of all of these was to protect the States which united in forming the Constitution from discriminations by Congress, which would operate unfairly or injuriously upon some States and not equally upon others.* (Emphasis added.)

See also Hylton v. United States, 3 U.S. (3 Dall.) 171, 180 (1796) (articles taxed in one state should be taxed in another; in this way, the spirit of jealousy is appeased, and tranquility preserved).

It is difficult to conceive of a non-uniform tax that would not "operate unfairly or injuriously upon some states and not equally upon others." In any event, the Windfall Profit Tax certainly does. As the *amicus* brief of Atlantic Richfield Company effectively shows, the exemption for certain Alaskan oil was intended to and has succeeded in encouraging the production of that oil. Millions of dollars have been invested to acquire, explore and develop Alaskan reserves, all in reliance on the Alaskan exemption. *See* Brief *Amicus Curiae* of Atlantic Richfield Company at 1-3. At the same time, the tax clearly discourages investment in the exploration and production of reserves in non-exempt areas because it decreases the available profit margin. In addition to the diversion of much needed investment funds from States whose oil production is not exempt from the tax, the resulting decrease in production will have a disastrous effect on the economy of those States which rely heavily on income from severance taxes, since the decreased production will result in diminishing severance tax receipts. The industry and economy of Alaska are thus built up to the injury of the other States. As Justice Story pointed out, this is precisely the result which the Uniformity Clause was intended to prevent.

The government concedes that the Windfall Profit Tax Act discriminates in favor of Alaska and against the remaining 49 States, but it argues that something more than mere discrimination is needed for the policy underlying the Uniformity Clause to be violated. Thus, the govern-

ment suggests that in addition to being discriminatory, the tax must have been the result of a "combination" of "substantial" or "broad-based" Congressional majorities and that it must strike at the "vital interests" of a particular region. The government further refines its narrow view of the purpose of the clause by suggesting that the clause was only intended to prevent these combinations from granting an undue preference to their own states or imposing an oppressive discrimination against a minority. Brief for the United States at 27.

A review of the authorities discussed above, however, reveals that the purpose of the uniformity requirement was not limited in any of the ways suggested by the government. While Justice Story gives numerous examples of ways in which various combinations of States might have abused the federal taxing power absent the restraint of the Uniformity Clause, he does not suggest that these were the only dangers that were perceived or intended to be precluded by the absolute requirement of uniformity. Rather, he points out that the intent was to preclude *all* undue preference of *one* state over another, not merely those imposed by a majority on a minority, or those imposed by a "combination" that would strike at the "vital interts" of a particular region. He further points out that this purpose was to be accomplished, and "the grossest and most oppressive inequalities" avoided, by requiring that indirect taxes be uniform throughout the United States.[12]

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[12] Certainly, as the government points out, North Carolina had reason to be pleased with the protection afforded it by the adoption of the clause. *See* C. Warren, The Making of the Constitution, 726-27 (2d ed. 1937). That North Carolina may have feared oppressive combinations among large states with ports and substantial shipping interests, however, does not show an intent to limit the protection of the clause to any particular type of combination. Indeed, Justice Story points out

Thus, all of the authorities agree that the Uniformity Clause was intended to prevent even the possibility of discrimination between States, and that the method chosen to effectuate this intent was to impose an absolute, unqualified requirement of geographic uniformity. Because the Windfall Profit Tax Act does not satisfy this requirement, it violates the literal terms of the Uniformity Clause. Because the act discriminates in favor of Alaska and against the remaining 49 States, it violates the underlying purpose of the clause as well.

As a corollary to its suggestion that the purpose of the Uniformity Clause was limited to preventing a combination of States from granting an undue preference to their own States or to impose an oppressive discrimination against a minority, the government suggests that the purpose of the clause is not violated if Congress has a rational justification for the preference granted or the discrimination imposed. While there is no support for this proposition in the legislative history of the clause, it is interesting to note that the justifications suggested here—a desire to accommodate special circumstances purportedly confined to a limited geographic area and a desire to distribute the tax burden more equitably among the States—are particularly inappropriate since the drafters of the clause specifically rejected considerations of intrinsic equality such as these when they chose to adopt a strictly geographic standard for uniformity.

In view of the drafters' intent not to require intrinsic but only geographic uniformity, the courts have consistently held that an intrinsically non-uniform tax is

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(Footnote 12 continued)
that absent the uniformity requirement, any number of different combinations might have been formed for any number of purposes.

constitutional so long as it is geographically uniform. for this Court now to hold that a desire to achieve intrinsic uniformity can render a geographically non-uniform tax constitutional would be either to replace the intended geographic uniformity test with a diluted intrinsic equality test, or it would be to effectively read the Uniformity Clause out of the Constitution. If intrinsic non-uniformity is justified by geographic uniformity and if geographic non-uniformity can be justified by a desire to achieve intrinsic uniformity, what, if anything, would be prohibited?

The only conclusion to be drawn from the history of the clause and its construction by the courts is that a lack of geographic uniformity cannot be justified by an attempt to accommodate particular local conditions or to distribute the tax burden more equitably among the states. As the Court said in *Florida v. Mellon*, 273 U.S. 12, 47 S.Ct. 265, 266 (1927):

> Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several states nor control the diverse conditions to be found in the various states which necessarily work unlike results from the enforcement of the same tax.

Indeed, since the courts have consistently held that geographic application is the *only* relevant factor in determining whether the Uniformity Clause has been violated, the conclusion is inescapable that there are *no* considerations that can justify a lack of geographic uniformity.[13]

[13] This conclusion is confirmed by the Court's decision in *Downes v. Bidwell*, 182 U.S. 244, 21 S.Ct. 770 (1901). As was noted above, a majority of the Court held that the import duty there at issue did not violate the Uniformity Clause because the clause was held inapplicable to territories such as Puerto Rico. *See supra* at 12. Justice Harlan would

Just recently, a majority of the Court rejected arguments that a geographically non-uniform bankruptcy law could be constitutional if justified by an identified national interest apart from the economic interests of particular debtors. In *Railway Labor Executives Ass'n v. Gibbons, supra*, the majority looked only to the geographical application of the challenged statute. Since the law was not geographically uniform, it was held unconstitutional without further inquiry.

The suggestion that justifications, particularly justifications aimed at creating intrinsic uniformity, can render a geographically non-uniform tax constitutional must be rejected in this case as well. However justified, the discrimination inherent in the Windfall Profit Tax Act is precisely the evil that the Uniformity Clause was intended

(Footnote 13 continued)
have held the Uniformity Clause applicable, and in his dissent, he commented as follows regarding the argument that despite the act's non-uniformity, it could survive constitutional scrutiny because of the suggested justification that concessions should be made to accommodate the assimilation of territories:

> *The authority to make such concessions implies the existence in Congress of power to declare that constitutional provisions may be ignored under special or embarrassing circumstances. No such dispensing power exists in any branch of our Government.* The Constitution is supreme over every foot of territory, wherever situated, under the jurisdiction of the United States, and its full operation cannot be stayed by any branch of the Government in order to meet what some may suppose to be extraordinary emergencies.... We cannot violate the Constitution in order to serve particular interests in our own or in foreign lands.

182 U.S. at 384, 21 S.Ct. at 824. (Emphasis added.) The majority as well at least implicitly rejected the argument that special circumstances could justify a violation of the Uniformity Clause when it observed that the duty would have been unconstitutional but for its finding that Puerto Rico was not part of the United States for purposes of the Uniformity Clause. *See supra* at 12.

to prevent. Thus, the act not only violates the literal terms of the clause, but it violates the spirit of the clause as well.

II. The Unconstitutionality of the Act Cannot Be Cured by Severing the Alaskan Exemption.

As is fully shown above, the Windfall Profit Tax Act violates the United States Constitution because it is not geographically uniform. The next question presented by the government is whether the Court can cure the constitutional defect under the doctrine of severance, or whether the Court must declare the act unconstitutional, leaving it to Congress to rewrite the act in a manner that comports with constitutional requirements. Actually, the government has presented quite a number of severability questions.

The thrust of the government's argument is that the unconstitutionality of the act can be cured by the simple expedient of severing the sections which create the exemption for certain Alaskan oil. Brief for the United States at 43-44. Nevertheless, although the government points out that these sections encompass federal offshore territories and enormous reserves that Congress *could* constitutionally exempt from the tax, *id.* at 20-21 n.27, 32-33 n.33, its severability argument ignores the subsidiary question of whether the unconstitutional differentiation between Alaska and other States can be severed from the constitutional differentiation between the federal outer continental shelf and the rest of the United States. Additionally, the government's suggested alternative remedies raise the question of whether the Court can apply the doctrine of severability either to extend the exemption to production in all areas similar to the Arctic Circle or areas located more than 75 miles from a pipeline connection, *see* R.

at 737 (Reply Brief for the Defendant United States of America and in Opposition to Motions for Summary Judgment),[14] or to extend the exemption to all newly discovered oil, Brief for the United States at 50 n.46. Finally, the government raises but does not discuss the question of whether Title I of the act can be severed from the remaining titles. Brief for the United States at 47 n.43.[15]

While the government may be correct in suggesting that the District Court engaged in judicial legislation by refusing to enforce the Windfall Profit Tax Act, Brief for the United States at 48, the prohibition against judicial legislation has never been viewed as being a bar to the exercise of a court's power to declare statutes unconstitutional. Similarly, the prohibition against judicial legislation has not been held to preclude a court from declaring a particular portion of a statute unconstitutional while enforcing the remainder, provided the requirements for severability are met.

Nevertheless, only one of the remedial alternatives in this case involves the doctrine of severability in its traditional sense. Since the Windfall Profit Tax Act (Title I of Pub.L. No. 96-223) is unconstitutionally non-uniform, the

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[14] Perhaps because it is impossible to identify what areas would be included, *see supra* at 23, the government has now apparently abandoned its argument that this would be an appropriate judicial remedy.

[15] In answering these questions, it is fundamentally important to remember the general principle that a court may not exercise legislative functions to save a law from conflict with a constitutional limitation. As this Court recognized in *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 46 S.Ct. 619, 623 (1926), "amendment cannot be substituted for construction." Indeed, even economic exigencies cannot justify the judicial revision of statutes. *See, e.g.*, Hill v. Tennessee Valley Authority, 549 F.2d 1064, 1074 (6th Cir. 1977), *aff'd*, 437 U.S. 153, 98 S.Ct. 2279 (1978); West Virginia Division of Izaak Walton League of America, Inc. v. Butz, 522 F.2d 945, 955 (4th Cir. 1975).

question arises whether that title is severable from the remaining titles of the statute. As the government points out:

> "The cardinal principle of statutory construction is to save and not to destroy."...The invalid portions of a statute are to be severed "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not."

Brief for the United States at 44 (Citations omitted).[16] Notwithstanding the government's assertion in footnote 43 of its brief that it is "questionable whether Congress would have intended to confer the benefits of the energy conservation and production measures provided by Title II of the Act, the low-income energy assistance provided for by Title III or, indeed, possibly any of the relief measures provided by Title IV of the Act, if the revenues generated by Title I would not be forthcoming," there has been no showing that Congress would not have enacted these completely separate titles of P.L. No. 96-223 absent the title which imposed the windfall profit tax. There is therefore no basis for the Court to declare the entire statute invalid.

The next question—whether all or part of the provisions which create the Alaskan exemption should be severed from the provisions which impose the tax—is really a question of available remedies rather than severance in its traditional sense. Although the invalidity of the act results from the coexistence of the exemption provisions with the taxing provisions, the exemption provisions are

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[16] *See also* Zobel v. Williams, __ U.S. __, 102 S.Ct. 2309 (1982); 2 Sutherland Statutory Construction § 44.04 (4th ed. C. Sands 1973), hereinafter cited as "Sutherland § __").

not invalid in and of themselves. The question, therefore, is not whether invalid provisions should be severed, but rather whether the Court can cure the unconstitutionality of the act by severance.

At first blush, it would seen that the decisions of this Court extending the traditional doctrine of severance to cure the unconstitutionality of underinclusive statutes by according benefits to the excluded class would support the applicability of the doctrine of severability in this case as well. It is now fairly well recognized that "[w]here a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend coverage of the statute to include those who are aggrieved by exclusion." *Welsh v. United States,* 398 U.S. 333, 361, 90 S.Ct. 1792, 1807-08 (1970) (Harland, J., concurring). The doctrine of severability has been extended to authorize this latter alternative, despite the fact that "the necessary remedial operation, extension, is more analogous to a graft than amputation." 398 U.S. at 364, 90 S.Ct. at 1809.

Nevertheless, the extension of the doctrine of severability to allow the benefits of a statute to be accorded to a plaintiff who was unconstitutionally excluded is fundamentally different from the extension of the doctrine to take away a benefit that was expressly intended by Congress to be given. A specific declaration of intent to benefit some does not necessarily indicate an intent not to extend the benefit to others; nevertheless, it does by its terms expressly state an intent that the benefit given should not be taken away. Additionally, to extend a benefit to a plaintiff gives him a remedy; whereas to remove the benefit from another leaves the plaintiff remediless. Perhaps for these

reasons, there are numerous cases where the unconstitutionality of a statute has been cured under the doctrine of severance by extending benefits to the excluded class,[17] yet one searches in vain for a case where an exemption has been severed so as to extend a burden.[18]

An even more important distinction, however, is that this Court has recognized that the power to order an extension of *benefits* is not clearly beyond the constitutional competence of a federal court. *Califano v. Westcott*, 443 U.S. 76, 91, 99 S.Ct. 2655, 2664 (1979). Conversely, the Court has not recognized its power to extend a burden. While it might be argued that the extension of *any burden* is a legislative function beyond the competence of the judiciary, certainly the extension of *taxes* is such a function.

The Constitution grants the power of taxation exclusively to the legislative branch of government. U.S. Const. Art. I, § 7, cl. 1. Thus, in *Helvering v. Griffiths*, 318 U.S. 371, 404, 63 S.Ct. 636, 653 (1943), the Court refused to enforce a federal income tax statute that provided for the

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[17] *E.g.*, National Life Ins. Co. v. United States, 277 U.S. 508, 48 S.Ct. 591 (1928); Welsh v. United States, 398 U.S. 333, 90 S.Ct. 1792 (1970); Califano v. Wescott, 443 U.S. 76, 99 S.Ct. 2655 (1979); Moritz v. Comm'r of Internal Revenue, 469 F.2d 466 (10th Cir. 1972); *cf.* Iowa-Des Moines National Bank v. Bennet, 284 U.S. 239, 52 S.Ct. 133 (1931).

[18] Perhaps for a lack of any better authority, the government relies heavily on a passage from this Court's decision in *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 52 S.Ct. 548 (1932), where the Court suggested that the severance of an exemption contained in a state statute, the primary object of which was to raise revenue, might best effectuate the legislature's intent. Nevertheless, since the Court found that the exemption did not render the statute unconstitutional, the suggestion was clearly dicta. In any event, as will be shown more fully below, the primary objective of the Windfall Profit Tax Act was not merely to raise revenues but to achieve an appropriate balance between raising revenues and encouraging domestic oil production. Legislative intent here will best be effected by *not* severing the exemption. *See infra* at 42-46.

taxation of stock dividends but only to the extent such dividends constituted income under the Sixteenth Amendment to the Constitution, stating: "We are unable to find that Congress intended to tax the dividends in question, and without congressional authority *we are powerless to do so.*" (Emphasis added). If the Court is powerless to impose a tax where the legislative intent to tax is equivocal, it certainly is powerless to impose a tax where the legislative intent is expressly and unequivocally *not* to tax.

This limitation on the Court's power was recognized in *Davis v. Wallace*, 257 U.S. 478, 42 S.Ct. 164 (1922), where the Court agreed with the plaintiffs that North Dakota's special excise tax could not be assessed against them on the basis of the general computation scheme after the excepting provision that governed computation of the tax as to them had been declared unconstitutional. The Court reasoned:

> Here the excepting provision was in the statute when it was enacted, and there can be no doubt that the legislature intended that the meaning of the other provisions should be taken as restricted accordingly. Only with that restricted meaning did they receive the legislative sanction which was essential to make them part of the statute law of the State; and no other authority is competent to give them a larger application.

257 U.S. at 484-85, 42 S.Ct. at 166.

Perhaps more particularly on point is the Court's observation in *Frost v. Corporation Commission of Oklahoma*, 278 U.S. 515, 525, 49 S.Ct. 235, 239 (1929), that if the statute there under consideration had contemporaneously exempted certain corporations from the require-

ments imposed, the invalid exemption could not be severed. The Court reasoned that "to hold otherwise would be to extend the scope of the law in that regard so as to embrace corporations which the legislature passing the statute had, by its very terms, expressly excluded." In this case, as well, to judicially excise the Alaskan exemption would be to ignore the expressly declared intent of Congress that oil produced in the exempt area should not be taxed.

The wisdom of not allowing tax burdens to be extended by judicial decree under the guise of severance is illustrated by this very case. As will be discussed more fully below, a number of critical policy considerations were involved in deciding what crude oil should be taxed and to what degree. The decision not to tax certain Alaskan oil was reached only after a thorough examination of the policy implications of such a decision. This is a legislative function which should be left to Congress. Indeed, the Constitution requires that it be left to Congress.

Even if there were no constitutional impediment to extending the windfall profit tax to some or all presently exempt areas, however, the doctrine of severance would not authorize such a result. As was noted above, severance is permissible only if the legislature would have enacted the provisions within its power independently of those which are not. *See supra* at 37. In this case, every indication points to the conclusion that Congress would not have enacted the Windfall Profit Tax Act in its present form absent the exemption.

One indicia of legislative intent regarding severance is whether the invalid portion of the statute is in a separate provision capable of being excised. Thus, in *Sloan v. Lemon*,

413 U.S. 825, 834, 93 S.Ct. 2982, 2987-88 (1973), the Court refused to sever unconstitutional aid to sectarian schools from constitutional aid to nonsectarian schools because "to approve such a distinction here would be to create a program quite different from the one the legislature actually adopted." Even more recently in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, __ U.S. __, 102 S.Ct. 2858, 2880 n.40 (1982), the Court refused to sever the unconstitutional grant to bankruptcy courts of jurisdiction over state law claims from the constitutional grant of jurisdiction over other claims, in part because the statute itself did not draw these distinctions but rather contained only a single statutory grant of jurisdiction.

These cases could tend to support an argument that if the exemption for Alaska is to be invalidated, the exemption for the outer continental shelf above the Arctic Circle should be invalidated as well. Nevertheless, such an argument is refuted by a second recognized indicia of congressional intent regarding severance—whether severance would defeat a dominant purpose of the act. In view of the legislative history showing that the dominant purpose of the act was to strike an appropriate balance between raising revenue and encouraging domestic oil production, it is clear that Congress would have wanted to retain as much of the exemption as was in its constitutional power to grant. More importantly, this same legislative history conclusively establishes that had Congress known that even some of the exemption would have been invalidated, the act in its present form would never have been passed. As was noted above, this is the ultimate test for severability.

Although in its most recent brief the government emphasizes the revenue-raising aspects of the Windfall Profit Tax Act, in the past it has equally emphasized the

importance of the act's production incentives.[19] Indeed, in its brief filed with the District Court in support of its Motion for Summary Judgment, the government effectively showed that the dominant purpose of the act was not merely to raise revenue, but rather that it was to strike an appropriate balance between the competing objectives of raising revenue and encouraging production, and that this balance was arrived at only after extensive negotiations and compromise. R. at 656.

Undoubtedly, the classifications and exemptions contained in the act were an integral part of the balance that was achieved. In its earlier brief to the District Court, the government concluded that "a careful review of the Act and its legislative history reveals that Congress made an exhaustive examination of relevant economic circumstances in the course of determining upon what oil production the tax would be levied and to what degree," R. at 657, and that "Congress devoted a great deal of effort and debate to devise a way to make certain that the contemplated excise tax would not act as a disincentive to oil production," *id.* at 661. Even in its most recent brief, the government acknowledges that "[w]hile the pattern of classifications and exemptions was modified in certain respects as the proposed legislation was considered by the House and the Senate, the *primary objective* remained 'to impose relatively high tax rates where production cannot be expected to respond very much to further increases in price and relatively low tax rates on oil whose production

[19] Even in its most recent brief, the government stresses the fact that the act was enacted as an integral part of a broader national energy program which was intended to encourage the exploration and production of oil, eliminate the inequalities and inefficiencies of the price control system, reduce the United States' dependency on foreign oil, and reduce the adverse balance of payments attributable to the importation of oil. Brief for the United States at 12, 14.

is likely to be responsive to price.' " Brief for the United States at 15. (Emphasis added.)

The Alaskan exemption in particular was considered to be a critical part of the balance. It is clear from the government's discussion of the act's legislative history that none of the seriously considered versions of the tax bill would have imposed a tax on oil produced from the presently exempt areas. *See* Brief for the United States at 15-20. It is equally clear that the reason for this consistent treatment of "exempt Alaskan oil" was the concern that taxation would discourage exploration and production of that oil. *Id.*

The importance of Alaska as an oil producing State was frequently emphasized. *See, e.g.,* 126 Cong. Rec. S 1842-3 (daily ed. March 13, 1980) (remarks of Rep. Young); 125 Cong. Rec. S 17666 (daily ed. Dec. 3, 1979) (remarks of Sen. Stevens). In general, Congress believed that there was a tremendous amount of oil yet to be produced in Alaska and that this oil should be exempt from the tax. *See* 125 Cong. Rec. S 18137 (daily ed. Dec. 10, 1979) (remarks of Sen. Long). The proven, but as yet undeveloped, Alaskan reserves were seen as constituting "probably the most promising province remaining in this country for developing domestic petroleum supplies." 126 Cong. Rec. S 2772 (daily ed. March 20, 1980) (remarks of Sen. Bellmon). The discovered, but as yet unproven reserves in the Kuparuk and Lisburne formations were also the subject of discussion. 125 Cong. Rec. S 17715 (daily ed. Dec. 4, 1979) (remarks of Sen. Bradley). And, as the government itself points out, the exempt reserves in the federal outer continental shelf may be even more substantial. Brief for the United States at 21 n.28.

The Joint Explanatory Statement of the Committee of Conference, which was the result of the compromise between the House and Senate delegates, illustrates the concern by Congress that these important oil producing regions would not be developed unless they were exempt from the tax:

> The exemption of Alaskan oil production for the designated locations reflects the concern of the conferees that taxation of this production would discourage exploration and development of reservoirs in areas of extreme climatic conditions.

H. Conf. Rep. No. 96-817, 96th Cong., 2d sess. 103, *reprinted in* [1980] U.S. Code Cong. & Ad. News, 642, 656. As the government itself previously pointed out: "The exemption of a portion of Alaskan oil production merely emphasizes the concern of Congress that imposition of the tax on certain Alaskan production would make it less likely that the state's resources would be developed fully." R. at 661. The government's discussion further shows that Congress carefully considered alternatives to the Alaskan exemption which would have promoted the act's purpose by encouraging domestic oil production, but that these alternatives were rejected. *Id.*

The Alaskan exemption was clearly a carefully considered component of the balance that was painstakingly struck between the competing objectives of raising revenues and encouraging domestic production. To judicially excise the exemption would destroy this balance, with the result that raising revenues would be overemphasized to the detriment of encouraging production. Under these circumstances, and particularly in view of the fact that none of the seriously considered versions of the

tax bill would have taxed the exempted area, it certainly cannot be said that Congress would have passed the act in its present form absent the Alaskan exemption.

In contrast to the wealth of legislative history which supports the conclusion that Congress did not intend for the Alaskan exemption to be severable from the remainder of the act, the government can point to only one statement which purportedly establishes that Congress intended the contrary—a statement by Senator Long that the general severability clause contained in the Internal Revenue Code would be applicable, so that if the courts should find a constitutional objection valid with respect to the Alaskan oil exemption, the exemption would be severed. Brief for the United States at 46.

The severability clause referred to by Senator Long provides that "[i]f any provision of this title...is held invalid, the remainder of the title...shall not be affected thereby." I.R.C. § 7852(a). Senator Long's interpretation of this clause notwithstanding,[20] it is highly questionable whether the clause should be construed to apply where the issue is the severability of one portion of a particular act from the remainder of that act. The intent of the clause was clearly to preserve existing provisions of "the title," meaning Title 26, which contains the entire Code. Obviously, it would be extremely unwieldly and undesirable if a constitutional flaw in a later appended tax statute could result in nullification of the entire Code. Whether or not the individual provisions of a later appended tax statute are

[20] As this Court recently reiterated, the views of some Congressmen as to the construction of a statute adopted years before by another Congress have " 'very little, if any, significance.' " *United States v. Clark*, 445 U.S. 23, 33 n.9, 100 S.Ct. 895, 902 (1980). (Citations omitted.)

severable from that statute, however, is simply not addressed.

Nevertheless, even if the Court were to hold that the general severability clause of the Code is applicable here, the clause would not require that the Court sever the Alaskan exemption rather than declare the entire act unconstitutional. A severability clause is merely an aid in determining legislative intent, not an inexorable command. *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330, 362, 55 S.Ct. 758, 767 (1935). The key remains legislative intent.[21]

The presence of even a particularized severability clause does not permit the court to alter a statute in a way that would defeat the statute's dominant purpose. As the Supreme Court stated in *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330, 362, 55 S.Ct. 758, 768 (1935): "[N]otwithstanding the presumption in favor of divisibility which arises from the legislative declaration, we cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." There, the Court struck down the entire Railroad Retirement Act rather than sever provisions which were found to be necessary for the accomplishment of the act's

[21] Where, as here, the severability clause relied on is a general severability clause in a pre-existing statute, its aid in determining legislative intent is very much weakened. As was pointed out in *Sutherland* § 44.11, p. 356:

> [I]t is a reasonable inference that because a general act cannot control subsequent legislative intent and therefore is questionable evidence of it, less weight may attach to such a general rule of separability than to the clause in a separate act.

dominant purpose, the establishment of a compulsory pension system.[22]

Thus, the primary consideration in every case, including cases involving a statute that contains a severability clause, is legislative intent; and this intent takes precedence over any presumption created by the existence of a severability clause. In the case of the Windfall Profit Tax Act, the legislative history clearly shows that Congress would not have been satisfied with the act had it not included the Alaskan exemption.

To the extent that the government relies on Senator Long's statement as being proof of a contrary intent, the reliance is misplaced. That Senator Long may have intended the Alaskan exemption to be severable is by no means indicative of the intent of the entire Congress. *See American Smelting and Refining Co. v. Occupational Safety and Health Review Comm'n*, 501 F.2d 504, 509 (8th Cir. 1974). And as this Court has recently reiterated on several occasions, the remarks of a single legislator, even the sponsor, are certainly not controlling in analyzing legislative history. *See, e.g., Weinberger v. Rossi*, __ U.S. __, 102 S.Ct. 1510, 1517 n.15 (1982); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311, 99 S.Ct. 1705, 1722 (1979).

In any event, while speaking in conclusory terms about intending the Alaskan exemption to be severable, Senator Long virtually admitted that Congress would not be satisfied with the act if the exemption were severed. He notes that as a result of severance, Alaska would pay the

[22] *See also* McGinnis v. Royster, 410 U.S. 263, 277, 93 S.Ct. 1055, 1063 (1973) (the removal of even a "subordinate" purpose may shift altogether the consensus of legislative judgment supporting the statute).

same 30 percent tax as everybody else, but states "if that were to be the case we would expect to act in the future to remedy this and to try to provide some consideration based on the cost of transportation and the high cost of developing oil and producing oil in those areas north of the Arctic Circle, and those areas that are far removed from a pipeline or any kind of a feasible water transportation." 126 Cong. Rec. S 3056 (daily ed. March 26, 1980) (remarks of Sen. Long). Thus, the legislative history of the Windfall Profit Tax Act, including the statements of Senator Long, fully supports the conclusion that the act would not have been passed in its present form absent the exemption for certain Alaskan oil.

The government has suggested as alternative remedies that the Court should extend the exemption to all newly discovered oil or to all areas similar to those presently exempt. *See* Brief for the United States at 50-51 n.46, Record at 727. Nevertheless, the Court must decline the government's invitation to rewrite the act in either of these respects. Even in those cases where some modification of a statute has been allowed under the doctrine of severance so as to extend a benefit to an unconstitutionally excluded class, the Court has recognized that where novel terms would have to be introduced into the statutory scheme, the definitional and policy questions involved should best be left to Congress. *Califano v. Westcott*, 443 U.S. 76, 92, 99 S.Ct. 2655, 2665 (1979). *Cf. Buckley v. Valeo*, 242 U.S. 1, 143, 96 S.Ct. 612, 693 (1976); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, __ U.S. __, 102 S.Ct. 2858, 2880 n.40 (1982).

Thus, the only appropriate remedy in this case is to declare the Windfall Profit Tax invalid in its entirety. This will permit Congress to reevaluate the statute and create a new legislative basis to achieve its goals of encouraging

domestic production and raising tax revenues, while at the same time complying with the constitutional requirement that excise taxes be geographically uniform throughout the United States. The economic aspects of striking the entire statute need not be severe if Congress acts quickly to pass a constitutional program. On the other hand, failure to develop oil production in Alaska to its full potential—the result Congress wished to avoid—may have long-range consequences for the nation's overall energy goals.

CONCLUSION

Title I of the Crude Oil Windfall Profit Tax Act of 1980 is clearly unconstitutional because it imposes an excise that is not geographically uniform throughout the United States. The only remedy in this case that will avoid impermissible judicial legislation is for the Court to declare the act invalid. Particularly in view of the legislative history which shows that Congress would not have passed the act in its present form absent the exemption, Congress, not the Court, should be entrusted with the task of restructuring the act to conform to the requirements of the Uniformity Clause in the way that will best effectuate its purpose of designing a tax that strikes the appropriate balance between raising revenues and increasing domestic production.

Respectfully submitted,

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